UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA, v. LUIS A. SANTIAGO, Defendant/Petitioner	Civil No. 99-325-P-C (Criminal No. 93-27-P-C)

GENE CARTER, District Judge

MEMORANDUM OF DECISION AND ORDER
DENYING REQUEST FOR A DOWNWARD DEPARTURE

Defendant seeks a six (6) level downward departure in his sentence due to post-conviction rehabilitation. He is aware, his *pro se* petition for relief under 28 U.S.C. § 2255 having been denied in 1998, that he is not able to bring another petition under that statute. He bases his claim for relief in this motion on 18 U.S.C. §§ 3553(b) and 3582(c)(2), 28 U.S.C. § 1651 (specifically, a writ of *audita querela*), and Fed. R. Civ. P. 60(b), none of which provides any basis for granting the motion.

Section 18 U.S.C. § 3582(c)(2) allows the court to modify a sentence when the sentencing range upon which that sentence was based has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o). Defendant contends that an amendment to section 5K2.0 effective November 1, 1998, changing the language of that section to conform to the Supreme Court's decision in *Koon v. United States*, 116 S. Ct. 2035 (1996), constitutes such a change. The Court concludes, for two reasons, that it does not. First, section 5K2.0 does not establish a sentencing range at all; it is merely a policy statement setting forth the circumstances under which a court may depart from a sentencing range. Second, the post-conviction rehabilitation recognized in *Koon* as a basis for downward departure is conduct that occurs after

conviction and before sentencing, not after sentencing. Even in the case law relied on by Defendant, post-sentencing rehabilitation is taken into account only when the defendant is resentenced for some reason other than the asserted rehabilitation. The only evidence of rehabilitation presented by this Defendant concerns his conduct in prison after sentencing, and the motion does not seek resentencing on any other basis.

Similarly, 19 U.S.C. § 3553(b) governs the application of the Sentencing Guidelines at the time of sentencing and does not provide authority for the sentencing court to later revise that sentence for any reason.

The writ of *audita querela*, to the extent that it remains available, addresses only illegal convictions. *United States v. Holder*, 936 F.2d 1, 5 (1st Cir. 1991). Defendant has not suggested in this motion that his conviction was illegal for any reason. To the extent Defendant's filing seeks relief by that writ, it is **DISMISSED**.

This Court has held in several cases, *e.g.*, *United States v. Moreno*, Criminal No. 90-36-P, although the opinions apparently are unpublished, that Fed. R. Civ. P. 60(b) does not provide a basis for modification of criminal sentences. *See Felker v. Turpin*, 101 F.3d 657, 660-61 (11th Cir. 1996); *United States v. Chapman*, 955 F. Supp. 781, 782 (W.D. Mich. 1997); *United States v. Rich*, 1998 WL 239022 (5th Cir. May 13, 1998) at *2; *Lopez v. Douglas*, 1998 WL 161663 (10th Cir. Apr. 8, 1998) at *1.

The relief sought in this filing is hereby **DENIED** for the reasons set forth above.

So **ORDERED**.

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GENE CARTER
District Judge

Dated at Portland, Maine this 21st day of January, 2000.